No. 16-327

In the Supreme Court of the United States

JAE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
JAMES I. PEARCE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner had not shown that he was prejudiced by his attorney's incorrect advice about the immigration consequences of his plea, so as to establish an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), when the evidence of his guilt was "overwhelming" and "nothing in the record" suggested that he had the option to enter a plea without immigration consequences.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 825 F.3d 311. The order of the district court (Pet. App. 11a-50a) is unreported but is available at 2014 WL 1260388.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. The petition for a writ of certiorari was filed on September 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of possessing ecstasy with the intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a, 15a. He was sentenced to 12 months and one day of imprisonment, to be

followed by three years of supervised release. *Id.* at 16a-17a. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, which the district court denied. Pet. App. 11a-50a. The court of appeals affirmed. *Id.* at 1a-10a.

1. Petitioner is a native of South Korea who was a restauranteur and drug dealer in Memphis, Tennessee. Pet. App. 2a. A confidential informant told federal agents that, over the course of eight years, petitioner had sold her roughly 200 ecstasy pills (and two ounces of hydroponic marijuana). Presentence Investigation Report (PSR) ¶ 7. The informant, under the surveillance of the agents, then made a controlled purchase of 15 ecstasy pills from petitioner. PSR ¶ 9. The agents later searched petitioner's townhouse, where they found 88 ecstasy pills, $32,432 in cash, three Valium tablets, and a loaded rifle. PSR ¶¶ 10, 36. Petitioner subsequently admitted both that he had possessed ecstasy and that he had distributed it to his friends. Pet. App. 2a.

A federal grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ecstasy with the intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a. That offense qualifies as an "aggravated felony" that renders an alien subject to removal upon conviction. 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii); 18 U.S.C. 924(c)(2); 21 U.S.C. 841(b); see Pet. App. 2a-3a. That consequence was relevant to petitioner, who came to the United States with his parents in 1982, but who has never become a U.S. citizen. Pet. App. 2a; PSR ¶¶ 34-35; see PSR ¶ 34 (noting that petitioner's sister lives in South Korea). Petitioner's attorney nevertheless "assured him that he would not be subject to * * *

removal" if he pleaded guilty. Pet. App. 2a (internal quotation marks omitted).

Petitioner ultimately pleaded guilty to the charged offense, pursuant to an agreement under which the government would (1) recommend that he receive a three-level reduction under Sentencing Guidelines § 3E1.1 for acceptance of responsibility, and (2) not object to application of the "safety valve" limitation on a statutory minimum sentence under 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. 2:09-cr-20011 Docket entry No. 21 (June 18, 2009) (Plea Agreement). At sentencing, the district court varied downward from an advisory Guidelines range of 24-30 months of imprisonment and sentenced petitioner to 12 months and a day in prison. Pet. App. 16a-17a & n.6. Petitioner did not appeal. *Id.* at 18a.

2. Petitioner subsequently moved under 18 U.S.C. 2255 to vacate his conviction and sentence on the ground that his attorney had provided ineffective assistance of counsel by, *inter alia*, misadvising him about the immigration consequences of his plea. Pet. App. 18a-19a. Following an evidentiary hearing, the district court (rejecting the disposition recommended by a magistrate judge) denied relief. *Id.* at 20a, 48a; see *id.* at 51a-77a (magistrate judge's report and recommendation). The district court agreed that counsel's incorrect advice amounted to deficient attorney performance under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), but determined that petitioner could not satisfy *Strickland*'s requirement to show that the deficient performance had prejudiced him. See Pet. App. 30a-48a.

The district court observed that this Court "has emphasized" that establishing prejudice in the context

of a guilty plea requires "'convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Pet. App. 31a (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010)). The court noted that, given petitioner's sales to the confidential informant and the numerous ecstasy pills found at his home, "the Government's case against [him] was quite strong." *Id.* at 45a. The court also highlighted the "tangible benefits" petitioner received from pleading, which "appear[ed] to have greatly reduced his sentence." *Id.* at 46a. And the court reasoned that "[i]n light of the overwhelming evidence of [petitioner's] guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-10a. The government conceded that petitioner's counsel had rendered deficient performance, so the court considered only whether petitioner had established prejudice. *Id.* at 3a.

The court of appeals acknowledged that immigration consequences are "relevant to the prejudice inquiry," because "a 'reasonable' non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty and might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." Pet. App. 8a. But it declined to hold "that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* 'rational under the circumstances' regardless of the merits of the defense." *Ibid.* It instead "join[ed] the Second, Fourth,

and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice." *Id.* at 10a.

Although the court of appeals viewed decisions in four other circuits as allowing a showing of prejudice in a wider range of circumstances, it was "convinced" that such a broad approach was mistaken. Pet. App. 5a; see *id.* at 4a (citing decisions of the Third, Seventh, Ninth, and Eleventh Circuits). The court observed that in *Padilla* v. *Kentucky*, *supra*, this Court had "emphasized 'the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong'" and had "declined to craft a deportation-specific prejudice rule" for a defendant who, like petitioner here, "had lived in the United States legally for decades and had alleged that 'he would have insisted on going to trial if he had not received incorrect advice from his attorney.'" Pet. App. 9a (quoting *Padilla*, 559 U.S. at 359, 371 n.12). The court accordingly refused to adopt an approach that "would provide those in [petitioner's] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." *Ibid.*

The court of appeals determined that petitioner had not established prejudice on the facts of this case. Pet. App. 10a. The court accepted "the district court's conclusion that the evidence of guilt was 'overwhelming'" and stressed that "deportation would have followed just as readily from a jury conviction as from a guilty plea." *Id.* at 3a. "Thus," the court determined, "aside from the off chance of jury nullification or the like, [petitioner] stood to gain nothing from going to

trial but more prison time." *Ibid.* Observing that "the possibility of arbitrariness, whimsy, caprice, nullification, and the like * * * are irrelevant to the prejudice inquiry' under *Strickland*," *id.* at 7a (quoting *Strickland*, 466 U.S. at 695 (internal quotation marks omitted)), the court explained that the "problem for [petitioner] is that he has no *bona fide* defense, not even a weak one," *id.* at 10a. The court also found the possibility that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable defense if his attorney had pursued the matter" to be "sheer speculation." *Id.* at 7a-8a.

ARGUMENT

Petitioner contends (Pet. 20-23) that the court of appeals erred in holding that he had failed to show that he was prejudiced by his counsel's incorrect advice about the immigration consequences of a conviction. The court's holding is correct and further review is not warranted.

1. a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant making a Sixth Amendment claim of ineffective assistance of counsel must show both (1) deficient performance, namely, "that counsel's representation fell below an objective standard of reasonableness," *id.* at 689, and (2) prejudice, namely, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. To demonstrate prejudice "[i]n cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Missouri* v.

Frye, 132 S. Ct. 1399, 1409 (2012) (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)).

This Court has made clear that the inquiry into whether a defendant would have forgone a plea includes an objective inquiry into his chances of prevailing at trial. The Court has explained, for example, that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59-60. Such "predictions of the outcome at a possible trial," the Court added, "should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59-60 (quoting *Strickland*, 466 U.S. at 695).

The Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), likewise supports such an objective inquiry. In *Padilla*, the Court considered a claim of ineffective assistance by an alien defendant who, like petitioner, had lived in the United States for decades, pleaded guilty to a removable offense, and "allege[d] that he would have insisted on going to trial if he had not received incorrect advice from his attorney" about the immigration consequences of a conviction. *Id.* at 359. The Court held that the attorney's performance had been deficient and remanded for the lower courts to conduct a prejudice inquiry in the first instance. See *id.* at 360, 374. In analyzing the attorney's performance, the Court recognized that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 368 (citation omitted). But on the issue of prejudice, the Court explained that "to obtain

relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 372 (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000)). And it emphasized that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id.* at 371 n.12.

b. The court of appeals correctly determined that petitioner has not made the requisite showing of prejudice here. Because the evidence was overwhelming, petitioner could not show that it would have been rational to go to trial as a means of avoiding removal. Removal "would have followed just as readily from a jury conviction as from a guilty plea." Pet. App. 3a. And because any "jury act[ing] according to law," *Strickland*, 466 U.S. at 694, would have found petitioner guilty, see Pet. App. 3a, petitioner "stood to gain nothing from going to trial but more prison time," *ibid.* Nor was there anything "in the record" to suggest that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter." *Id.* at 7a-8a.

Petitioner does not dispute that the evidence against him—which included a controlled drug purchase and a large quantity of drugs found in his home—was "overwhelming." Pet. App. 3a; *id.* at 46a-47a. Accordingly, petitioner's only prospect of prevailing at trial was the "off chance of jury nullification or the like." *Id.* at 3a. As the court of appeals recognized (*id.* at 7a), however, jury nullification and other outcomes that are not based upon the facts and the law are irrelevant to an objective analysis of whether

a defendant would have been better off had he refused to plead guilty. See *Hill*, 474 U.S. at 60; *Strickland*, 466 U.S. at 695. As the Court explained in *Strickland*, because a "defendant has no entitlement to the luck of a lawless decisionmaker," an "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" and instead "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695.

c. Petitioner's challenge to the holding below would effectively amount to a *per se* rule of prejudice whenever a defendant asserts that he would not have taken a plea deal had he been properly advised of the immigration consequences of a conviction. Such a rule is unwarranted and cannot be squared with the objective focus of the prejudice inquiry, see, *e.g.*, *Padilla*, 559 U.S. at 372; this Court's emphasis on the difficulty of proving prejudice, see, *e.g.*, *id.* at 371 n.12; and the remand for further proceedings on prejudice in *Padilla*, the circumstances of which were similar to this case, *id.* at 359-360, 374.

Petitioner contends (Pet. 20-21) that, had he known of the immigration consequences of a conviction on the charged offense, he "could have attempted to negotiate for an outcome that would not have carried automatic deportation sanctions." That contention departs from his argument in the court of appeals, which was limited to the contention that he would have taken his chances at trial. See Pet. C.A. Br. 35-39. In any event, the court viewed the possibility that petitioner might have pleaded guilty to a nonremovable offense

to be "sheer speculation" without any support "in the record." Pet. App. 8a. Having failed to introduce evidence on this point at the evidentiary hearing, petitioner cannot now seek to do so in the petition. Nor can he sustain his claim based on generalized descriptions of prosecutorial practices, which are in any event inaccurate. See U.S. Dep't of Justice, *Criminal Tax Manual* §§ 10.02, 16.06 (2016 rev.), https://www.justice.gov/tax/page/file/477071/download (last visited Nov. 21, 2016) (explaining circumstances under which misdemeanor tax charges are appropriate). And because his argument would seem to apply to any alien who might claim that he could have negotiated a better deal to avoid removal, accepting that argument would lead to automatic findings of prejudice for all or nearly all defendants whose attorneys misadvise them about the immigration consequences of conviction.

Petitioner also posits (Pet. 22-23) two reasons why, had he known the immigration consequences of conviction, he might have preferred *losing* at trial, with a resulting longer prison sentence, to the shorter sentence he achieved through the plea. He did not advance any such argument in the court of appeals, and he makes no attempt to tie it to his testimony at the evidentiary hearing. Cf. *Hill*, 474 U.S. at 60 (rejecting ineffective-assistance claim where defendant "failed to allege the kind of 'prejudice' necessary to satisfy" *Strickland*). In any event, his putative reasons for preferring a loss at trial are neither "rational," *Padilla*, 559 U.S. at 372, nor likely to have formed part of petitioner's subjective calculus. Cf. *Hill*, 474 U.S. at 59 (considering how particular factor would have affected defendant's decisionmaking). Petitioner

provides no factual basis for believing that he would willingly have invited a much longer prison sentence on the vague hope that, during the extra time, legislative or executive policy towards aliens convicted of aggravated felonies would change in a way that favored him. Nor is it reasonable to believe, again, without any evidence, that he would have preferred limited prison visitation rights, at a facility that may have been nowhere near his family and friends, to freedom elsewhere.

2. Petitioner's claim of a circuit conflict reads the court of appeals' decision more rigidly than the opinion's language indicates. And while courts have not articulated a uniform approach to prejudice analysis in cases where a defendant's counsel has provided deficient advice about the immigration consequences of a plea, denial of relief on the facts of this case is not inconsistent with any decision of another court of appeals.

a. Contrary to the implication of the question presented (Pet. i), the court of appeals did not hold in this case that "it is *always* irrational" for a defendant who faces removal upon conviction to go to trial when the evidence against him is "strong" (emphasis added). Rather, the court's "holding" was only that a court "should * * * take[] into account" both "a claimant's ties to the United States" *and* "the legal merits" in determining "whether counsel's bad advice caused prejudice." Pet. App. 10a (emphasis omitted). In recognizing that both factors are relevant, the court distinguished between a defendant whose case was merely "weak" and a defendant like petitioner who had "no *bona fide* defense" to the charge against him. *Ibid.* The other precedential Sixth Circuit decision on which

petitioner relies (Pet. 12), *Pilla* v. *United States*, 668 F.3d 368 (2012), similarly addressed a situation in which the defendant "had no rational defense." *Id.* at 373; see *United States* v. *Haddad*, 486 Fed. Appx. 517, 521 (6th Cir. 2012) (observing that the defendant "ha[d] no rational defense") (cited at Pet. 2, 11, 23). And the court in this case left open the potential for a different result for a defendant who, unlike petitioner, provides evidence that he could have obtained a different plea deal had he been aware of the immigration consequences of the one to which he agreed. See *id.* at 7a-8a (acknowledging the "possibility" of such an outcome, but finding no evidence supporting it "in the record before us").

b. The court of appeals observed (Pet. App. 4a), and petitioner does not dispute (Pet. 12-13), that its decision in this case accords with the Fifth Circuit's decision in *United States* v. *Kayode*, 777 F.3d 719 (2014). The court in that case examined the "totality of the circumstances," including a number of factors, to conclude that the defendant had not shown prejudice. *Id.* at 725; see *id.* at 725-729. One of the "important" factors was "overwhelming evidence against" the defendant, see *id.* at 726 (internal quotation marks omitted), which made success at trial improbable and therefore "weigh[ed] against finding prejudice," *id.* at 727.

The court of appeals also observed (Pet. App. 4a) that its decision in this case accords with decisions of the Second and Fourth Circuits. Petitioner errs in contending otherwise (Pet. 14-15). Consistent with the court of appeals' holding here, the Second Circuit in *Kovacs* v. *United States*, 744 F.3d 44 (2014), held that prejudice in this context requires showing "a

reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense." *Id.* at 52. The Second Circuit found the defendant in that case to have satisfied that standard based on circumstances—record evidence showing a reasonable probability of a different plea deal and the existence of a limitations defense—that have no analogue here. See *id.* at 53-54.

Likewise, consistent with the court of appeals' holding here, the Fourth Circuit in *United States* v. *Akinsade*, 686 F.3d 248, 255-256 (2012), held that in analyzing prejudice, "the potential strength of the state's case must inform our analysis, inasmuch as a reasonable defendant would surely take it into account." *Id.* at 255 (citation, internal quotation marks and alteration omitted). The Fourth Circuit found prejudice in that particular case based on the defendant's potential trial defense that his fraud did not exceed the relevant statutory threshold of $10,000. *Id.* at 255-256. Petitioner is thus wrong to suggest (Pet. 14), that the evidence in that case, like the evidence here, was "overwhelming."

c. The court of appeals did view its approach to prejudice in this case to be different from the approaches of four other circuits. See Pet. App. 4a. But notwithstanding any difference in approaches, it is far from clear that any other circuit would in fact have found prejudice in the specific circumstances of this case, where no evidence supports the possibility of a more favorable outcome had petitioner been informed of the immigration consequences of a conviction. As this Court has recognized, "whether a given defendant has made the requisite showing [of prejudice] will turn

on the facts of a particular case." *Flores-Ortega*, 528 U.S. at 485 (citation omitted); see *Padilla*, 559 U.S. at 372 (prejudice inquiry asks whether a defendant's "decision to reject the plea bargain would have been rational *under the circumstances*") (emphasis added).

Neither *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), nor *Hernandez* v. *United States*, 778 F.3d 1230 (11th Cir. 2015), explicitly addressed a situation in which, as in this case, the defendant had "no *bona fide* defense" (Pet. App. 10a) and no possibility of a better plea deal. See *Rodriguez-Vega*, 797 F.3d at 788-792; *Hernandez*, 778 F.3d at 1234. Nor did the Third Circuit address such a situation in *United States* v. *Orocio*, 645 F.3d 630 (2011), abrogated on other grounds by *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013). In that case, the Third Circuit rejected an approach under which proof of prejudice would require not only a showing that the defendant would have rejected a guilty plea, but also a showing "that he would have been acquitted, had he gone to trial." *Id.* at 643; see *id.* at 645 (quoting district court's requirement that the defendant show "that he would not have been convicted at trial"). It then reasoned, based on the facts as alleged in that case, that the defendant there "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the *possibility* of a single decade in prison," and it remanded for an evidentiary hearing. *Id.* at 645 (emphasis added); see *id.* at 646. It did not consider an argument that, in fact, no legitimate possibility existed of avoiding an unfavorable trial outcome.

Finally, although the government argued in *DeBartolo* v. *United States*, 790 F.3d 775 (2015), that "the

evidence [wa]s so stacked against [the defendant] that he would not in fact have insisted on a trial," *id.* at 778, the Seventh Circuit found otherwise, concluding instead that "conviction would not have been the sure thing that the government claims," *id.* at 779. The Seventh Circuit observed that the "defense * * * would have been that [the defendant's] marijuana project was a flop, that he had obtained only a few ounces of the drug from it, and that he had given that meager harvest away rather than selling it." *Ibid.* The Seventh Circuit appeared to view such a defense, if believed by the jury, as a potential way to avoid removal, because it would have led to conviction for "simple possession of marijuana (which would not have been a basis for mandatory deportation)." *Ibid.* Under the drug statutes, when someone is convicted of "distributing a small amount of marihuana for no remuneration," his offense is treated as simple marijuana possession, which for non-recidivists is a misdemeanor offense that does not qualify as an "aggravated felony" for purposes of removal. 21 U.S.C. 841(b)(4); see 21 U.S.C. 844(a); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1689 (2013).* No similar misdemeanor-punishment option is available for the ecstasy-distribution offense with which petitioner was charged, see 21 U.S.C. 841(b), and petitioner's situation is thus distinct from the situation of the defendant in *DeBartolo*.

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* Although the defendant in *DeBartolo* had a prior drug conviction, 790 F.3d at 777, the government had not filed an information about that conviction, *id.* at 778-779, and the court presumed that a marijuana-possession conviction "would not have been a basis for mandatory deportation," *id.* at 779.

The Seventh Circuit also supported its prejudice finding in *DeBartolo* by reference to additional factors that were not credited by the court of appeals in this case—*e.g.*, the possibility of jury nullification and speculation about a more favorable plea deal, see 790 F.3d 778-780. A future Seventh Circuit panel, however, would not be bound to view those factors alone as mandating a finding of prejudice. Doing so would essentially amount to a *per se* rule of prejudice, which would be inconsistent with the decisions of this Court. See pp 6-11, *supra*. Any claim of a conflict based on the statements in *DeBartolo* is therefore premature and does not warrant this Court's intervention.

d. State-court decisions cited by petitioner's amicus (AAJC Amicus Br. 5-6) likewise fail to demonstrate that the courts deciding those cases would have reached a different result in this one. See *Commonwealth* v. *Lavrinenko*, 38 N.E.3d 278, 292-297 (Mass. 2015) (remanding for evidentiary hearing on prejudice that would address, *inter alia*, viability of defendant's proposed trial defenses); *Zemene* v. *Clarke*, 768 S.E.2d 684, 692 (Va. 2015) (remanding for evidentiary hearing where defendant "objectively" stood to gain from going to trial); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) (en banc) (concluding, without confronting any argument that evidence against the defendant was overwhelming, that insisting on trial would have been rational). Further review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
JAMES I. PEARCE
Attorney

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